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No. 82-217

In the Supreme Court of the United States

October Term, 1982

SHIRLEY STOVER, *et al.*,
Petitioners,

vs.

MELANIE HANSON JOHNSON AND GERARD STANLEY JOHNSON, *et al.*, AND JACQUELINE N. RAU,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENTS MELANIE HANSON JOHNSON AND GERARD STANLEY JOHNSON, *et al.*, IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the District Court's Order of January 25, 1982, enjoining individual class members from proceeding with pending state court suits and settling their claims for punitive damages constitute an appealable order under 28 U.S.C. § 1292(a)(1)?

2. Does the Anti-Injunction Act, 28 U.S.C. § 2283, prohibit a federal district court from enjoining individual members of a mandatory class from proceeding with pending state court suits, whether by settlement or otherwise?

LIST OF PARTIES

Parties to the proceedings in the Eighth Circuit were: Shirley Stover;*+ The Honorable Scott O. Wright, United States District Judge for the Western District of Missouri;+ Jacqueline N. Rau;* Melanie Hanson Johnson, Gerard Stanley Johnson, and other state and federal court plaintiffs;+ Crown Center Redevelopment Corporation;*+ Hallmark Cards, Inc.;*+ Hyatt Corporation;*+ and Hyatt Hotels Corporation.*+

The Plaintiffs' Liaison Committee appointed by the state court participated as *amicus curiae*.

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* Party to No. 82-1207, Appeal of Jacqueline N. Rau.

+ Party to No. 82-1181, Petition for Mandamus of Melanie Hanson Johnson and Gerard Stanley Johnson, *et al.*

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OPINIONS BELOW

The January 25, 1982, Order of the District Court is reported at 93 F.R.D. 415 (W.D. Mo. 1982). The opinion of the Court of Appeals for the Eighth Circuit is reported at 680 F.2d 1175 (8th Cir. 1982).

STATEMENT

On July 17, 1981, two skywalks collapsed at the Hyatt Regency Hotel in Kansas City, Missouri, killing 114 persons and causing physical injury to approximately 220 others. The vast majority of the lawsuits arising from the skywalks collapse were filed in the Circuit Court of Jackson County, Missouri. As of August 5, 1982, 187 cases, representing the claims of approximately 200 victims, had been filed in the Missouri state court. Only eighteen cases were filed in the United States District Court for the Western District of Missouri; of these, some have been dismissed and refiled in state court and some have been settled. Five cases presently remain on file in the District Court.

In September, 1981, both the state and the federal courts consolidated their respective cases for discovery and appointed state and federal Plaintiffs' Liaison Committees to proceed with consolidated discovery and other matters. Until the District Court's class certification order of January 25, 1982, the Plaintiffs' Liaison Committees had conducted and were proceeding with substantial discovery. Comprehensive interrogatories were served on defendants, who responded with thousands of pages of answers. In response to plaintiffs' document requests, defendants produced several hundred thousand pages of documents, which were placed in a depository jointly funded by plaintiffs and defendants. Plaintiffs' Liaison Committees also negotiated with defendants and the National Bureau of Standards for extensive testing of the skywalks debris.[1]

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1. *See In re Skywalk Cases*, No. CV81-15244 MCF (Cir. Ct. Jackson County, Mo. Order of June 3, 1982) (Resp. A. 4a-14a).

References to "Pet. A." refer to the appendices attached to the Petition for Writ of Certiorari. References to "Resp. A." refer to the appendices attached to this Brief in Opposition.

On September 1, 1981, Molly Riley, a victim with superficial injuries, filed a complaint in the District Court requesting that a class action of all skywalks victims be certified under Rule 23.[2] Among other things, Riley sought certification of a mandatory class under Rule 23(b)(1)(B) on the issue of defendants' liability to the class for punitive damages. The purpose of this class was to seek recovery of a single sum of punitive damages to be awarded in favor of the class as a whole. The alleged justification for a mandatory class action was Riley's concern that the aggregate assets and liability insurance coverage of all defendants would be exhausted before all claims for actual and punitive damages were satisfied. Riley based her argument solely upon an allegation by defendant Hyatt Corporation that the total *prayers* of all lawsuits on file exceeded the $333 million in insurance coverage available to defendants.[3]

Respondents Melanie Hanson Johnson, Gerard Stanley Johnson, and other victims of the skywalks collapse intervened in Riley's action to oppose class certification. At the December 10, 1981, hearing, opposition to class certification was overwhelming. Affidavits of 175 individual state and federal plaintiffs opposing certification of any class action were filed with the District Court. All defendants opposed class certification. Only plaintiff Riley then supported the class. Riley adduced no evidence at the hearing to show that the actual value of victims' claims exceeded or even remotely approached defendants' ability

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2. Riley initially filed a class action petition in state court, *Riley v. Crown Center Redevelopment Corp., et al.*, No. CV81-16322 (Cir. Ct. Jackson County, Mo. filed July 30, 1981), but dismissed it on September 24, 1981, after her federal complaint was on file.

3. *See* Petition for Declaratory Judgment and Incidental Relief, *Hyatt Corp. v. Occidental Fire & Casualty Co. of North Carolina, et al.*, No. CV81-32809 (Cir. Ct. Jackson County, Mo. October 2, 1981), at 9.

to respond to damage judgments, either through liability insurance coverage or other assets.

On January 25, 1982, the District Court certified a mandatory class action on several issues: (1) under Rule 23(b)(1)(A) on liability issues, based on a finding that individual suits would create a risk of inconsistent results;[4] and (2) under Rule 23(b)(1)(B) on punitive damage issues—both liability and amount—based on the court's concern that the "limited fund" composed of the insurance coverage and aggregate assets of all defendants might prove insufficient to satisfy all punitive damage judgments.[5]

Also contained in the District Court's Order of January 25, 1982, is the specific language that enjoined the settlement of all skywalks-related punitive damage claims, including long-pending state court lawsuits: "Those claimants who want to exact payment for allegedly punishable acts must forego the settlement process and await the trial of the punitive damages issues." 93 F.R.D. at 428 (Pet. A. 60a). The District Court's intention regarding the injunctive effect of that order on the prosecution of individual state court cases, whether by trial or settlement, was reiterated in the court's subsequent, more explicit language. "Individual unnamed class members may not conduct the prosecution of any claim." Order of January 29, 1982 (Resp. A. 2a).

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4. Even Judge Heaney's dissent recognized the District Court's misapplication of Rule 23(b)(1)(A) to a group of separate tort actions for unliquidated money damages. 680 F.2d at 1197 n.8 (Pet. A. 34a n.8).

5. The District Court considered that the "fund" of resources available to defendants to respond to damage judgments might be "limited" by either or both (1) the possible insolvency of defendants (although no such evidence was adduced at the December 10, 1981, hearing); and (2) the operation of Missouri law to restrict more than a single award of punitive damages against any defendant (Pet. A. 33a). *But see Rinker v. Ford Motor Co.*, 567 S.W.2d 695 (Mo. App., D.K.C. 1978) (rejecting under Missouri law defendant's public policy argument against multiple punitive damages liability exposure).

The practical effect of the District Court's January 25, 1982, Order was to bring the individual prosecution and settlement of both federal and state court skywalks cases to an immediate halt. Prior to the entry of that order, 122 claims, including cases in both state and federal court, had been settled for total amounts in excess of $18 million. After January 25 and for as long as the District Court's Order of January 25, 1982, remained in effect, not a single skywalks claim was settled.[6]

Respondents challenged both the class certification and the injunctive aspects of the District Court's Order of January 25, 1982. Melanie Hanson Johnson, Gerard Stanley Johnson, the others filed a petition for a writ of mandamus in the United States Court of Appeals for the Eighth Circuit requesting that the class certification be set aside on numerous grounds.[7] Pursuant to 28 U.S.C. § 1292(a)(1), Jacqueline N. Rau appealed the District Court's injunction against the settlement or other prose-

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6. Immediately after the Eighth Circuit vacated the Order of January 25, 1982, the settlement process recommenced. In the period from June 7 to August 5, 1982, 47 additional claims were settled for nearly $5.5 million. As of August 5, 1982, a total of 169 claims had been settled for more than $24 million.

7. The petition for a writ of mandamus filed by respondents Johnson argued that the class certified by the District Court was inherently defective because its primary function was to obtain a single, class-wide award of punitive damages. Issues raised but not reached by the Eighth Circuit included the following: (1) the District Court's erroneous application of Rule 23(b)(1)(A) to a group of tort claims for unliquidated money damages; (2) the absence of a sufficient factual record to justify a finding that a "limited fund" exists (*see In re Northern District of California "Dalkon Shield" IUD Products Liability Litigation*, Nos. 81-4040, et al., slip op. at 8 (9th Cir. June 18, 1982)); (3) the District Court's misinterpretation of Missouri law regarding multiple awards of punitive damages against a single defendant; (4) the "fluid recovery" nature of the District Court's proposed remedy which is not authorized under Rule 23; and (5) the legal impossibility of awarding and dividing a single amount of punitive damages awarded to the class as a whole without violating defendants' constitutional due process rights and plaintiffs' constitutional rights to trial by jury.

cution of her state court action. She contended, among other things, that the injunction violated the Anti-Injunction Act, 28 U.S.C. § 2283. In the alternative, respondent Rau sought a writ of mandamus, requesting the same relief as respondents Johnson, *et al.* The petition for mandamus and the appeal were consolidated by the Eighth Circuit.

On June 7, 1982, the Eighth Circuit vacated the District Court's Order of January 25, 1982. The Court of Appeals held that the *specific language* of the District Court's Order constituted an injunction appealable as of right under 28 U.S.C. § 1292(a)(1). "In the present case, contrary to the class's assertion, the district court *expressly prohibited* class members from settling their punitive damage claims . . . ." 680 F.2d at 1180 (Pet. A 9a) (emphasis added).[8] The court further held that this injunction violated the Anti-Injunction Act, 28 U.S.C. § 2283, by enjoining the prosecution or settlement of pending state court litigation.

Rehearing and rehearing *en banc* were denied without comment on July 9, 1982.

REASONS FOR DENYING THE WRIT

The Petition for Writ of Certiorari misstates the scope of the Eighth Circuit's decision on the two points briefed. That decision cannot be read as holding that *every* order certifying a mandatory class action constitutes an injunction appealable as of right. On the contrary, the Eighth Circuit's decision is extremely narrow. It holds only that the *specific language* of the District Court's Order of

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8. Judge Heaney's dissent did not disagree with the majority's conclusion that the language in the District Court's January 25, 1982, Order was an injunction. 680 F.2d at 1188 n.1, 1192 n.16 (Pet. A. 19a n.1, 34a n.16).

January 28, 1982, constituted an injunction of pending state court cases. 680 F.2d at 1180 (Pet. A. 9a). The words and actions of the District Court demonstrate that its class certification order was also an injunction. The Eighth Circuit decision is entirely consistent with the recent decisions of this Court.

Petitioner's claim that the Eighth Circuit's decision eviscerates Rule 23 is without merit. The decision below turned solely on the specific fact situation presented. The decision does not hold that all orders certifying mandatory class actions constitute injunctions. The Anti-Injunction Act, 28 U.S.C. § 2283, was applicable in this case because the District Court specifically enjoined pending state litigation. If the Eighth Circuit had held otherwise, its opinion would have been in direct conflict with the decisions of this Court. In the rare instance in which a class certification order entered by a federal district court also enjoins pending state court litigation, the plain language of the Anti-Injunction Act is violated. The vast majority of class actions certified in federal court, however, involve either actions within exclusive federal jurisdiction or those that do not involve the keen individual interests likely to lead claimants to prosecute their claims in state court. As discussed below, petitioner has failed to present any "special and important reasons" justifying review by this Court.[9] Supreme Court Rule 17.1.

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9. There are two additional grounds for denying the writ. First, petitioner abandoned the class certified on January 28, 1982, and sought certification of a *different* class in the District Court. Second, the basis for federal jurisdiction over this action was diversity of citizenship between petitioner Stover and defendants. In early September, 1982, however, petitioner settled her individual action. Petitioner has been the only known plaintiff willing to serve as representative who was diverse from all defendants. *See* 93 F.R.D. at 419, 425-26 (Pet. A. 41a, 55a-56a); 680 F.2d at 1179 n.9 (Pet. A. 6a); Order and

(Continued on following page)

ARGUMENT

I. ON THE FACTS OF THIS CASE, THE DISTRICT COURT'S ORDER OF JANUARY 25, 1982, CONSTITUTED AN INJUNCTION APPEALABLE AS OF RIGHT.

Petitioner misleads this Court when she claims the Eighth Circuit's decision holds that the mere certification of a mandatory class action constitutes an injunction within the meaning of 28 U.S.C. § 1292(a)(1). It was the District Court's explicit prohibition against the settlement of punitive damage claims by class members, not the class certification order itself, that constituted the injunction.

It is irrelevant that the District Court did not label its order an injunction; the determination whether an order is an injunction depends upon its substantial effect rather than its terminology. *Ettelson v. Metropolitan Life Ins. Co.*, 317 U.S. 188 (1942); *In re Glenn W. Turner Enterprises Litigation*, 521 F.2d 775, 778 (3d Cir. 1975). In this case, the effect of the order was injunctive. Indeed, everyone connected with this litigation has agreed that the District Court intended to and did enjoin individual settlements of punitive damage claims. The District Court's order is itself filled with statements of this intent. All members of the Eighth Circuit panel, includ-

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Footnote continued—

Memorandum of September 17, 1982, at 4-5 (W.D. Mo. 1982) (reciting the fact of petitioner's settlement and denying certification of a Rule 23(b)(3) class for lack of a diverse representative). Without complete diversity between the class representative and the defendants, the federal courts have no jurisdiction over this matter and it must be dismissed. Rule 23 does not apply unless subject matter jurisdiction exists. *Cf. Zahn v. International Paper Co.*, 414 U.S. 291 (1974). Therefore, certiorari should be denied.

ing dissenting Judge Heaney, found that the restraint on settlement was an injunction. 680 F.2d at 1180, 1185 n.1 (Pet. A. 9a, 19a-20a n.1). Petitioner herself has admitted that the District Court's order enjoined class members from settling punitive damage claims individually. In a memorandum filed with the District Court on February 10, 1982, petitioner stated: "[T]he short answer . . . is that this Court's Order and Memorandum certifying the class *forbids* individual settlements of claims for punitive damages." (Resp. A. 17a (emphasis supplied). Petitioner's counsel reaffirmed this view of the effect of the order in oral argument before the Eighth Circuit on March 12, 1982.

> Mr. Younger: Now, in certifying a nonopted [sic] out class, as Mr. Wolff conceded, and as I would concede, the practical effect of the order is to make it improper for members of the class to take certain steps in the state court.

Transcript of Proceedings before the Eighth Circuit Court of Appeals, March 12, 1982, Nos. 82-1181 and 82-1207, at 81.

Petitioner's arguments concerning this Court's strict construction of the finality requirement, in furtherance of the congressional policy against piecemeal appeals contained in 28 U.S.C. § 1291, are inapposite. In § 1292(a)(1) Congress has specifically provided for exceptions to the final decision requirement by allowing immediate appeals from orders "granting, continuing, modifying, refusing or dissolving injunctions." Moreover, the Eighth Circuit's decision is in harmony with a recent Supreme Court decision involving appealability under § 1292(a)(1) of an order not specifically labeled as an injunction.

In *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981), this Court found that a district court's refusal to enter

a consent decree encompassing injunctive relief was immediately appealable under § 1292(a)(1) because it had the "practical effect" of refusing an injunction. *Id.* at 85. Like the refusal of an injunction, the refusal to enter the decree would have "serious, perhaps irreparable, consequence." *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 181 (1955).

> First, petitioners might lose their opportunity to settle their case on the negotiated terms.
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> • • •
>
> By refusing to enter the proposed consent decree, the District Court effectively ordered the parties to proceed to trial and to have their respective rights and liabilities established within limits laid down by that court. Because a party to a pending settlement might be legally justified in withdrawing its consent to the agreement once trial is held and final judgment entered, the District Court's order might thus have the "serious, perhaps irreparable, consequence" of denying the parties their *right* to compromise their dispute on mutually agreeable terms.

Carson v. American Brands, *supra*, at 86-88 (footnotes omitted) (emphasis supplied). Respondents agree with petitioner that the mere certification of a class, standing alone, "has no irreparable consequences and is therefore outside the ambit of § 1292(a)(1)." (Pet. 9) It is, however, the District Court's injunction against individual settlement that creates the irreparable injury. As with the class members in *Carson*, individual skywalks victims were suffering the "serious, perhaps irreparable, consequence" of being denied the right to settle their claims on terms negotiated by them and were instead being forced to trial in a forum not of their choosing.

For these reasons, petitioner's contentions that the Eighth Circuit's decision is in conflict with *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978), and *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), are incorrect. In *Gardner*, this Court determined that the mere denial of class certification in a case involving a prayer for injunctive relief did not constitute the denial of an injunction under 28 U.S.C. § 1292(a)(1). In reaching this result, this Court pointed out that the district court's order did not affect the merits of the would-be representative's own claim or pass on the legal sufficiency of any claims for injunctive relief. Therefore, the order denying class certification had no irreparable effect. The District Court's order in the skywalks cases, on the other hand, by preventing class members from settling their punitive damage claims, gravely affected the victims' rights.

The *Gardner* Court also noted that the petitioner there had *not* sought a preliminary injunction. The Court then distinguished *Gardner* from *Jenkins v. Blue Cross Mutual Hospital Ins., Inc.*, 538 F.2d 164 (7th Cir. 1976), *cert. denied*, 429 U.S. 986 (1976). In *Jenkins*, the Seventh Circuit found a denial of class certification to be appealable under § 1292(a)(1) because the order directly controlled the subsequent refusal to grant a preliminary injunction. *Jenkins* recognized the difference between a mere refusal to certify a class action and the denial of an injunction intimately related to the class issues. The former order is not appealable as of right, while the latter is. The situation created by the District Court's Order of January 25, 1982, is analogous to that presented in *Jenkins*.

Petitioner's reliance upon *Coopers & Lybrand v. Livesay* is similarly misplaced, for *Coopers & Lybrand* dealt not with appealability under § 1292(a)(1), but rather with

whether the denial of class certification constituted a "final decision" under 28 U.S.C. § 1291. The portion of the *Coopers & Lybrand* opinion quoted by petitioner was a criticism of the case-by-case analysis used by the courts of appeals in applying the "death knell" doctrine as an exception to the finality requirement of § 1291. None of these considerations is pertinent to a discussion of § 1292 (a)(1).

The Eighth Circuit's decision is in complete harmony with the principles of *Carson* and *Gardner*. It held that the District Court had enjoined all class members from settling punitive damage claims. Such an injunction is appealable as of right under 28 U.S.C. § 1292(a)(1).

II. THE NARROW RULING OF THE COURT OF APPEALS WILL HAVE LITTLE IMPACT UPON THE ADMINISTRATION OF RULE 23.

A. The Eighth Circuit's Decision Will Affect Very Few Cases.

There will be few, if any, cases in the future which will present the precise issues resolved by the Eighth Circuit in the skywalks litigation. The only persons likely to be affected by the decision below are the skywalks litigants themselves.

The unique facts of this case are crucial to an understanding of the scope of the Eighth Circuit's opinion. As the statement of facts indicates, the skywalks cases are fundamentally state court cases. All but eighteen of 187 actions were initially filed in state court; only five federal cases remain. This is not a situation in which a single maverick state court litigant has acted to deprive all other class members of their choice of a federal forum and a class action procedural device. Indeed, the opposite is much

closer to the truth. Only two class members (Molly Riley and petitioner Shirley Stover) unconditionally support the federal class.

In its January 25, 1982, Order, the District Court did more than enjoin a few newly-filed state cases. The Court of Appeals' opinion details the consolidation orders in both state and federal court and the massive amounts of discovery and other pretrial activities that had been conducted during the *six-month* period prior to the District Court's injunctive order. 680 F.2d at 1177-78, 1180 (Pet. A. 3a-4a). Even assuming that a federal district court would ever be justified in enjoining the prosecution and settlement of the claims of members of a mandatory class, there will rarely be a mandatory class in which the overwhelming majority of class members had long before chosen to proceed with their claims in state court and in which "[t]he state court cases had been filed, consolidated, and discovery had begun," 680 F.2d at 1180, prior to the entry of the injunction.

A factor highlighting the narrowness of the Eighth Circuit's decision is the genesis of the skywalks cases in a mass disaster. Virtually every court presented with the issue has found that a class action is not the proper vehicle for the prosecution of claims arising from mass disasters. *See, e.g., Causey v. Pan American World Airways, Inc.*, 66 F.R.D. 392 (E.D. Va. 1975); *Marchesi v. Eastern Airlines*, 68 F.R.D. 500 (E.D.N.Y. 1975); *Daye v. Pennsylvania*, 344 F. Supp. 1337 (E.D. Pa. 1972), *aff'd*, 483 F.2d 294 (3d Cir. 1973), *cert. denied sub nom. Meyers v. Pennsylvania*, 416 U.S. 946; *Hobbs v. Northeast Airlines, Inc.*, 50 F.R.D. 76 (E.D. Pa. 1970). It is in this kind of litigation that the interests of individual litigants in controlling their own substantial damage claims outweigh any perceived efficiency obtained through the class action

device. In the rare instances in which a class has been certified in a case involving large numbers of personal injury claimants, Rule 23(b)(3) has been used, *see, e.g., In re "Agent Orange" Products Liability Litigation*, 506 F. Supp. 762, 787 (E.D.N.Y.), *rev'd on other grounds*, 635 F.2d 987 (2d Cir. 1980), *cert. denied sub nom. Chapman v. Dow Chemical Co.*, 102 S. Ct. 980 (1981); *Payton v. Abbott Labs*, 83 F.R.D. 382, 386-87 (D. Mass. 1979), and the issue involved here simply does not arise. In most mandatory federal class actions, as in federal class actions generally, very few class members have ever bothered to file a separate state proceeding, much less to pursue it as vigorously as the skywalks victims have pursued their state court cases in this litigation.

In short, there will be few, if any, situations in which a federal district court properly certifies a mandatory class action[10] involving large numbers of state court plaintiffs who have already engaged in extensive state court discovery and also enjoins those state court plaintiffs from settlement or other prosecution of their state court claims. The impact on the administration of Rule 23 of the Eighth Circuit's decision will be minimal. The disastrous picture painted by petitioner is without substance.

B. The Limited Fund Doctrine of Rule 22 Interpleader Actions Is Inapplicable to This Case.

Petitioner attempts to analogize this mass disaster litigation and the District Court's mandatory class action to Rule 22 interpleader actions, in which an injunction may issue to halt pending state proceedings without vio-

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10. Certification of a mandatory class pursuant to Rule 23(b)(1)(B) was improper in this case on a number of independent grounds. *See* note 7, *supra*.

lating the Anti-Injunction Act. This argument is unpersuasive. As the Eighth Circuit's opinion noted, interpleader jurisdiction depends on the existence of identifiable property or a closed fund. 680 F.2d at 1182 (Pet. A. 13a). Interpleader is not appropriate in cases in which the "fund" consists of the defendant's assets, because a defendant's liability, unlike the known extent of a closed fund, is in theory limitless. *See General Electric Credit Corp. v. Grubbs*, 447 F.2d 286, 289-90 (5th Cir. 1971), *rev'd on other grounds*, 405 U.S. 699 (1972).

Aside from the skywalks cases, only two other courts have certified mandatory class actions in mass disasters on a "limited fund" theory. In the first, *Coburn v. 4-R Corp.*, 77 F.R.D. 43 (E.D. Ky. 1977), *petition for mandamus denied sub nom. Union Light, Heat & Power Co. v. United States District Court*, 588 F.2d 543 (6th Cir. 1978), *cert. dismissed*, 443 U.S. 913 (1979), parallel state litigation proceeded in cooperation with the federal class, and no injunction against the state proceedings was ever reported. The second was the *"Dalkon Shield"* litigation, and as petitioner correctly points out, the class certification order was vacated by the United States Court of Appeals for the Ninth Circuit on June 18, 1982. *In re Northern District of California "Dalkon Shield" IUD Products Liability Litigation*, Nos. 81-4648, *et al.* (9th Cir. June 18, 1982). Petitioner's statement, however, that none of the reasons for that reversal applies to the skywalks litigation is not correct. In vacating the district court's mandatory class, the Ninth Circuit noted that its own precedent prohibits certification of mass tort claims under Rule 23(b)(1)(B) unless separate actions "inescapably will alter the substance of the rights of others having similar claims." *McDonnell Douglas Corp. v. United States District Court, C.D. of California*, 523 F.2d 1083, 1086 (9th Cir. 1975), *cert. denied sub nom. Flanagan v. McDonnell Douglas*

Corp., 425 U.S. 911 (1976), quoting *LaMar v. H & B Novelty and Loan Co.*, 489 F.2d 461, 467 (9th Cir. 1973) (emphasis supplied). The *"Dalkon Shield"* litigation did not satisfy this stringent test. *In re Northern District of California "Dalkon Shield" IUD Products Liability Litigation*, *supra*, slip op. at 6. If the defendant is an ongoing business entity, it is doubtful that the "limited fund" theory will suffice to support class certification. *See* Schroeder, *Relitigation of Common Issues: The Failure of Nonparty Preclusion and an Alternative Proposal*, 67 Iowa L. Rev. 917, 958-63 (1982).

C. The District Court's Injunction Violates the Anti-Injunction Act.

This Court has given the Anti-Injunction Act an extremely strict construction.

> This is not a statute conveying a broad general policy for appropriate *ad hoc* application. Legislative policy is here expressed in a clear-cut prohibition qualified only by specifically defined exceptions.

Amalgamated Clothing Workers v. Richman Bros., 348 U.S. 511, 515-16 (1955). More recently, this Court has similarly admonished:

> [A]ny doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy.

Atlantic Coast Line Railroad v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 297 (1970). The purpose of this prohibition against injunctions of state court proceedings is to "forestall the inevitable friction between the state

and federal courts that ensues from the injunction of state judicial proceedings by a federal court." *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 630 (1977). Only by a very strict construction can § 2283 accomplish its purpose.

Petitioner argues that the District Court's injunction nevertheless escapes the prohibition of § 2283 because it falls within the Act's exception for injunctions "necessary in aid of its jurisdiction." (Pet. 13). Not only is this argument without merit, it contradicts petitioner's other positions. In arguing that the District Court's order did not constitute an injunction, petitioner states that the certification of a federal class action does not prevent class members from freely pursuing separate actions in state court, citing *In re Glenn W. Turner Enterprises Litigation*, 521 F.2d 775 (3d Cir. 1975) (Pet. 8). This statement impliedly recognizes that simultaneous state court actions involving the same subject matter do not impair federal jurisdiction. This being so, there is absolutely no reason for a federal court to enjoin the state court litigants, and any such injunction could not be necessary in aid of the federal court's jurisdiction.

Aside from the inconsistent arguments that petitioner raises, there is no legal basis for exempting the District Court's order from the Act's prohibition. Petitioner cites *Capital Service, Inc. v. NLRB*, 347 U.S. 501 (1954), in support of her argument (Pet. 13). *Capital Service* involved proceedings before a federal agency vested by Congress with exclusive jurisdiction over labor matters. In this case, the District Court, pursuant to 28 U.S.C. § 1332, could have only *concurrent* jurisdiction over these state law tort claims.

More to the point is *Atlantic Coast Line Railroad v. Brotherhood of Locomotive Engineers*, *supra*, also cited

by petitioner, in which this Court vacated an injunction because federal and state courts had concurrent jurisdiction over the subject matter. This Court has long held that a simultaneous *in personam* state action does not impair federal court jurisdiction over an action involving the same subject matter. *Kline v. Burke Constr. Co.*, 260 U.S. 226 (1922). *In re Glenn W. Turner Enterprises Litigation*, 521 F.2d 775 (3d Cir. 1975), refused to apply the "in aid of jurisdiction" exception to allow the injunction of a prior state court action by a federal court in which a class suit involving the same subject matter was pending.

> The alleged inability of the various defendants to pay a judgment resulting from the federal class action if the Kentucky Attorney General is allowed to execute upon his judgment is not cause to create an exception to this general rule . . . . [T]he inability of defendants to pay a judgment, assuming it exists, still would not be sufficient justification to issue the federal injunction. The fundament of the rule forbidding federal courts from enjoining parallel *in personam* state proceedings is a recognition of the principle that absent statutory or constitutional directive, the state and lower federal courts are independent, and that a federal action is not superior to a state proceeding merely because of its federal character. As a corollary to this principle, judgments resulting from federal actions are not preferred to judgments resulting from state actions because of their federal character.

521 F.2d at 780 (citations omitted). *See also Piambino v. Bailey*, 610 F.2d 1306, 1334 (5th Cir. 1980), *cert. denied sub nom. Piambino v. Sylva*, 449 U.S. 1011 (1981) ("The fact that [defendant] might have fewer assets available

to satisfy any judgment entered as a result of the Florida federal litigation in no way affects the jurisdiction of the federal court.").

Given the strict construction required of the Anti-Injunction Act and petitioner's failure to show that the injunction falls within one of its specific exceptions, the ruling of the Eighth Circuit was correct. To reach any other decision would be to ignore this Court's admonition that any doubts as to the propriety of an injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed. *Atlantic Coast Line Railroad v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 296-97 (1970).

CONCLUSION

The decision of the Court of Appeals for the Eighth Circuit is a narrow one which turns on the specific facts presented by the skywalks litigation. Petitioner has failed to show that the Eighth Circuit's opinion is erroneous in any respect.

Since the Eighth Circuit's decertification of the class action, approximately 50 additional claims have been settled, for a total of 160 claims settled. The state Plaintiffs' Liaison Committee has undertaken extensive discovery, and a consolidated trial of all the state court cases has been set for March 14, 1983. At present, cases representing 128 claimants are pending in state court, while only five cases remain pending in the District Court. Petitioner's attempt to wrest this litigation from the jurisdiction of the Missouri state courts on behalf of a handful of cases pending in federal court should not be condoned by this Court.

Respectfully submitted,

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September, 1982

APPENDIX

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[illegible]
[illegible]

August 9, 1982

Honorable Scott O. Wright
District Judge
United States Courthouse
811 Grand Avenue
Kansas City, MO 64106

Dear Judge Wright:

I was informed approximately 1/2 hour ago that Justice Blackmun had denied our Petition to Recall the Mandate and to Stay said Mandate pending a decision on our Petition for Writ of Certiorari. Accordingly, I request that this Court consider our motion made in the alternative to modify the old class or certify a new class solely as a motion to certify a new class. If the Court would like any further briefing on the matter, counsel for the class would be happy to provide such forthwith.

Very truly yours,

Paul Martin Wolff

cc: All Counsel of Record

IN THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

IN RE FEDERAL SKYWALK CASES)

ORDER

Individual unnamed class members may not conduct the prosecution of any claim. The class is represented by class counsel who are responsible for the conduct of all claims of the class. No matters may be presented to this Court which concerns a member of the class unless it is presented by the counsel designated to handle the class action. The Clerk of the Court has been directed to reject any matters that are not being filed by counsel for the class or counsel for defendants. Only matters which pertain to the completed settlement of an unnamed class member's claim may be filed by those unnamed members.

The counsel appointed to represent the class are in charge of prosecuting the claims of the class. If any unnamed member of the class has a legitimate concern, that concern should be brought to the attention of the class counsel.

Accordingly, it is hereby

ORDERED that the Wicker motion to voluntarily dismiss certain defendants without prejudice is dismissed as improperly filed. It is further

ORDERED that the Johnson, et al. notice to take the deposition of plaintiff Stover and her counsel is quashed as improperly filed.

/s/ Scott O. Wright
Scott O. Wright
United States District Judge

Kansas City, Mo.

January 29, 1982.

IN THE
CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

IN RE: SKYWALK CASES	)	CV81-15244 MCF
	)	CIVIL DOCKET "T"

ORDER

On February 2, 1982 Plaintiffs' Liaison Committee filed in this Court on behalf of all plaintiffs a "Motion For an Order Directing That Depositions May Commence". Thereafter suggestions for and in opposition to said motion were filed, the last having been filed February 24, 1982.

It was the understanding of this Court that Plaintiffs' Liaison Committee did not want that motion set down for hearing or ruled on suggestions, but wanted the matter deferred. The Court understood that they were going to address the issue in their action filed in the United States Court of Appeals for the Eighth Circuit.

Thereafter Plaintiffs' Liaison Committee filed a mandamus action in the Missouri Court of Appeals for the Western District to compel this Court to rule that motion.

Upon receipt of the notice of the filing of the mandamus petition, this Court noted the apparent misunderstanding and set the motion for oral argument on May 27, 1982. At a meeting between Plaintiffs' Liaison Committee and Defendants' Liaison Committee the Court noted that the issues raised in the mandamus action in the Missouri Court of Appeals were raised by *wrongful death plaintiffs* only, who suggested that those plaintiffs should be permitted to proceed with depositions for the reason that they would be entitled to prove "aggravating circumstances" in their compensatory damage trial in the State

Court regardless of the outcome in either settlement or trial in the Federal District Court. Plaintiffs' Liaison Committee advised that this was the limited discovery they wished to pursue at this time and that they would amend their February 2, 1982 motion to so state. They have done so by filing an amended motion May 28, 1982.

Defendants' Liaison Committee, on the other hand, advised that they wanted their "Motion to Stay Proceedings" taken up and considered at the same time. That was so ordered.

Plaintiffs' Liaison Committee reminds the Court that through the cooperative effort of this Court and the Federal District Court, a Plaintiffs' Liaison Committee was appointed and consolidated discovery proceeded in both Courts with unusual cooperation between the Courts and *all* counsel. They remind the Court that great strides were made in discovery with unusual cooperation between all parties. They allege that prior to the class certification by the Federal District Court on January 25, 1982 the parties had settled 121 bodily injury and death claims through the payment of more than 18.6 million dollars to compensate victims and their families. Forty-one percent of the death claims, 35 percent of the minor personal injury claims and 26 percent of the claims of those hospitalized had been settled.

The classes certified by Judge Wright were certified for a limited purpose:

1. A class pursuant to Rule 23 (b)(1)(a) Federal Rules of Civil Procedure, to try the "issues of (defendants) liability (to class members) for compensatory damages".

2. A class pursuant to Rule 23 (b)(1)(b), Federal Rules of Civil Procedure, to try the "issues of (defen-

dants) liability (to class members) for *punitive damages* and the amount of punitive damages".

Plaintiffs' Liaison Committee points out the issues of the class members entitlement to compensatory damages and the amount thereof were not included in the class issues.

Subsequent to the class certification Plaintiffs' Liaison Committee petitioned for a Writ of Mandamus in the United States Court of Appeals for the Eighth Circuit asking that the classes as certified be decertified. That mandamus action has been briefed and argued by the parties, but not ruled.

The parties have favored this Court with a copy of all briefs filed in that action as they were filed.

In that mandamus action, Plaintiffs' Liaison Committee, speaking for 175 plaintiffs who either filed their cases in the State Court, or had claims pending, objected to the two class certifications. *ALL* defendants objected to the class certifications and argued that the Federal District Court exceeded its jurisdiction.

Plaintiffs' Liaison Committee advises that the history of progress since the certification is this:

A) There has been great antagonism between Plaintiffs' Liaison Committee and the group they represent and the lead counsel for the Class Action attorneys;

B) All plaintiffs' attorneys, other than Class Action attorneys, and counsel for all defendants argued for decertification of the two classes before the U. S. Court of Appeals for the Eighth Circuit;

C) Only ten depositions have been taken by Class Action attorneys since they began in March;

D) Over 90 plaintiffs who have cases pending in the State Court have not been permitted to participate in those depositions or give input or confer on strategy with lead Class Counsel;

E) Class Action attorneys have not counselled with Plaintiffs' Liaison Committee or sought any input in strategy on the use of experts;

F) It is reported in the *Kansas City Star* that Class Action attorneys have been discussing a proposed settlement for punitive damages in which they will request a fee of 2.4 million dollars and $500,000 expenses. This enormous fee which is requested by lead Class Counsel exemplifies one of the great differences between Plaintiffs' Liaison Committee and lead Class Counsel. They argue that lead Class Counsel has taken one relatively minor personal injury case and catapulted it into a huge fee. They say this conflict of objectives by lead Class Counsel is in violation of the interests of those seriously injured who are primarily interested in an adequate award. Particularly this is true they argue, when one considers that after settlement of the punitive damage issues, the liability for compensatory damages and the numerous issues involved therein may remain for determination at trial in the State Court;

G) Two of the Class Action attorneys have voiced objections to the premature settling of punitive damages and the amount of the proposed fee—one for the reason that it is too large and another because it is too small;

H) There continues to be greater and greater antagonism between lead Class Counsel and Plaintiffs' Liaison Committee;

I) More important than any other matter listed, is that all settlements have stopped.

Plaintiffs' Liaison Committee and all defendants place the blame for these irreconcilable conflicts between Plaintiffs' Liaison Committee and lead Class Counsel on the latter's position taken in his Motion in Limine filed in Federal District Court which illustrates the conflict. In that motion Class Action counsel complain that allowing individuals to settle their cases during the pending of the proceedings would have the "troubling consequence" of "unfairness" to Class Action counsel because such settlements might adversely affect the size of any possible punitive damages award and thereby reduce their attorney fees. Plaintiff's Motion in Limine at 14 N.7.

The interplay in the Hyatt litigation and the advocacy of the varying positions is part of our system of justice. Yet, there is a delicate balance that must be maintained and each group must respect the image of the system and make every effort to see that justice is done and, just as important, that the people involved feel that there has been justice.

Life is emotional. This sort of tragedy raises the height of those emotions. People have suffered grave and great losses. It is important to ALL of us that these lives be repaired with as much speed and delicacy as can be mustered.

It helps to determine the goals of the system of justice and the goals of the attorneys and attempt to meet them.

Plaintiffs' Liaison Committee argues that the fundamental requisite of what process is due under the law is a right in a mass disaster case involving serious personal injury or death to select your attorney, to select the defendants you want to sue, to determine your own trial strategy and finally to settle your lawsuit. They say that the opportunity to participate in your lawsuit is the core of justice.

They state that the certification improperly shifts the focus to the ancillary issue of punitive damages by giving that issue priority over the more urgent matter of compensation of the injured victims. This points up the fundamental conflict between the 178 plaintiffs who oppose the class and the court-appointed lead Class Counsel. There is a marked difference in the interests of those who have substantial claims for actual damages and the others in the class who will not obtain significant awards for actual damages. Those who have minor injuries can only obtain significant recovery through an award of punitive damages.

"It is axiomatic that a putative representative cannot adequately protect the class if his interests are antagonistic to or in conflict with the objectives of those he purports to represent." 7C. *Wright and A. Miller*, Federal Practice and Procedure, §1768 at 638 (1972).

This Court will not address the merits of the class action or attempt to predict the outcome of those issues pending before the Court of Appeals for the Eighth Circuit.

It is important to address the question of what happens if that mandamus action is not ruled on in the immediate future or if the ruling is deferred until after a settlement is negotiated. In the event of a settlement of the punitive damage issue there will most certainly be an appeal or a collateral attack at which time the issues now before the Court will be ruled by the U. S. Court of Appeals for the Eighth Circuit.

Counsel for Hallmark Cards, Inc. in its brief before the Eighth Circuit noted a cautionary statement made by a leading commentator as to class action procedures. That is:

"It clearly would be a perversely wasteful expenditure of time and effort to go through the agony of class action certification, complete extensive discovery, negotiate and approve a settlement or actually adjudicate the merits of the case, and draft and enter a judgment only to have it unravelled three or five years later by someone who does not want to be bound by the result, claims that he or she was inadequately represented, and now wants a day in court." *Wright and Miller, supra*, at 29.

If that should happen, the people with serious injuries and deaths will have been forced to sit on the sidelines of the case while lawyers that they have not selected pursue their case for them, and may be deprived of proceeding with their case for several years, a clear injustice to them. This has happened in the case of *Vincent v Hughes Air West, Inc.*, 557 F. 2d 759 (9th Cir., 1977) where after five years of litigation the class was decertified.

In the event of decertification Plaintiffs' Liaison Committee would be entitled to pursue discovery of matters not addressed by class counsel.

In this same connection it should be pointed out that even if the class action is not decertified, but proceeds and is resolved either by trial or settlement, Plaintiffs' Liaison Committee will be entitled to conduct discovery in order to prove the issue of "aggravating circumstances" in the wrongful death cases.

Justice for these people is their perception of justice and what happens to them and their case. There is no substitute for having their own lawyer in whom they have reposed their confidence and trust.

Defendants answer all these points by asserting the burden and expense on them if depositions and discovery are allowed to proceed in the State cases. They argue that the duplication of discovery would be oppressive.

The alternative of re-doing all or part of the depositions a year or so hence suggests a far greater burden on everyone.

Plaintiffs' Liaison Committee argues that, "aggravating circumstances" which is a permissible element of damages in wrongful death cases are given in a single award and are unlike punitive damages. *Glick v Ballentine Produce, Inc.*, 396 S.W. 2d, 609 (1965) *Appeal Dismissed*, 385 U. S. 5, (1966). They say therefore that this issue is not being pursued in the Federal class action and further that defendants Hyatt, Eldridge Construction Co., Havens Steel and PBNDML, in their briefs filed before the Eighth Circuit argued that wrongful death actions cannot be included in a punitive damage class.

Plaintiffs state, therefore, that they are entitled under Missouri Rules of Civil Procedure to conduct discovery on their claims. They point out that although the class action is pending in the Federal District Court, Judge Wright has entered no order to stay these proceedings or to enjoin the plaintiffs from going forward with the desired discovery. They claim that the Federal Anti-Injunction Act, 28 U. S. C. §2283 specifically prohibits the Federal Courts from enjoining State proceedings except in certain inapplicable exceptions.

Plaintiffs seek to frame this particular issue for appeal. Both sides of the controversy have advised the Court they intend to appeal. The question of how to treat the wrongful death claimants in the class action if it is allowed to continue is one which the Federal Courts

must determine on the basis of the applicable law of the State of Missouri. These issues should be addressed and decided by the Missouri Courts. This is particularly true in an extraordinary circumstance such as is presented by this disaster. These issues, hopefully, may be addressed by the Missouri Court of Appeals through the vehicle of the rulings on the current motion. Then there will be no need for the Federal Courts to speculate as to what the rule of law is in Missouri under the circumstances of these many cases.

Ever since the ruling in *Erie Railroad v Tompkins*, 304 U. S. 64, 48 S. Ct. 817, "the laws of the States, whether they be those enacted by the State Legislature or as declared by its highest court, control in the Federal Courts." 20 Am. Jur. 2d Courts §207. In all cases where the Federal Court is exercising jurisdiction solely because of the diversity of the citizenship of the parties, the outcome of the litigation in the Federal Court should be substantially the same as it would be if tried in a State Court. *Id.* §209.

This Court cannot close the door to those litigants who have filed in the State Court and order that they sit on the sidelines of this litigation any longer. The Court feels that in all fairness and justice they should be allowed to participate in discovery and pursue their cases.

Courts are reluctant to interfere with the jurisdiction of another court. The question is one of great delicacy and leads to a conflict of jurisdiction. The Federal and State Courts act independently within their spheres. This ruling causes no such conflict. Rather, it results in the State Court proceeding concurrently—coordinately with the Federal Court.

"Where the judgment sought is strictly in personam both a State and a Federal Court, having jurisdiction may

proceed with the litigation;" "priority" and "comity" are not an issue in these cases. *Id.* §128, §135.

This Court concludes that proceeding with discovery is appropriate and necessary in view of the posture of these cases.

This Court must give effect to plaintiffs' selection of a court. Next to the deep loss suffered by the injured and the survivors of those killed which was equally shared by the community as a whole, the greatest tragedy that could be suffered by these many litigants in this disaster is not in the fact of any injustice in their case, but rather in the feeling of an injustice.

Accordingly, this Court SUSTAINS Plaintiffs' Liaison Committee's Motion to Proceed With Discovery in the Wrongful Death Actions. Of course, any depositions taken in those actions may be used in all actions pending to avoid duplication of effort. At Plaintiffs' Liaison Committee's request, this order is limited to the wrongful death actions so that the several issues that these actions raise may be considered on appeal of this order. This consideration would be particularly helpful to guide the trial court in the future handling of these many actions.

It follows that defendants PBNDML, Gillum-Colaco, Havens Steel, Agcrete, Inc., Smith & Boucher, Inc., Motions to Stay Proceedings are all OVERRULED.

The Court directs that Plaintiffs' Liaison Committee and Defendants' Liaison Committee meet and confer on the subject of how to proceed with the ordered discovery and report their suggestions to the Court on or before June 11, 1982. Of course they should endeavor to see if some agreement may be reached in this regard with Class Action attorneys. Some accommodation would have to be reached in this regard if the two classes were decertified

on appeal now or at a later time. That accommodation should be made now. This Court expects that discovery will proceed in an orderly manner and in good judgment with all of the interests of all parties considered.

The Court will on June 7, 1982 enter this order unless prohibited by the Missouri Court of Appeals, Western District of the Supreme Court of Missouri. This will give defendants an opportunity for "appeal" and review of this order.

/s/ Timothy D. O'Leary
Judge Timothy D. O'Leary

DATE: June 3, 1982

Copies mailed to:

Patrick McLarney, Plaintiffs' Liaison Committee

Thomas Leittem, Defendants' Liaison Committee

for distribution to all other parties.

Missouri Court of Appeals, Western District,
The Honorable Harold L. Lowenstein

GLADYS TYREE, Clerk

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF MISSOURI
WESTERN DIVISION

IN RE FEDERAL SKYWALK CASES)
)
)

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION IN LIMINE

INTRODUCTION

In its Order and Memorandum of January 25, 1982, certifying a class under Rule 23(b)(1), this Court established two simple and fundamental ground rules for individual settlements between defendants and members of the class. The first rule is that defendants and members of the class can settle claims for compensatory damages on an individual basis. The second and equally important rule is that claims for punitive damages cannot be settled on an individual basis. (Order, pp. 12, 17.)

As the Court noted, permitting individual settlements of compensatory damage claims will enable victims who choose to do so to "negotiate and execute settlement agreements with those defendants who have vociferously urged this Court to allow the settlement process to continue." (Order, p. 17.) At the same time, barring settlements of punitive damage claims is absolutely essential to "protect the interest of every victim in receiving his or her just share of any punitive damage award." (Order, p. 12.) An equitable division of punitive damages can be achieved

"[o]*nly by a single class-wide adjudication of punitive damages* . . . ." *Id.* (Emphasis supplied.)

Despite the clear language of the Order and Memorandum certifying the class, certain defendants have recently given notice that they intend to obtain individual settlements not only of claims for compensatory damages but also of claims for punitive damages. Defendants Crown Center Redevelopment Corporation, Hallmark Cards, Inc., and Hyatt Corporation (hereinafter "defendants") plan to settle "claims for compensatory damages, *but will only settle such claims in return for a full release of all claims, including a waiver of any claim for punitive damages.*" Notice, Feb. 2, 1982, at 1 (emphasis supplied). Defendants plan to pay a single, undivided sum in return for the release of a victim's claims for both compensatory and punitive damages. At the class trial on punitive damages, defendants plan to use these settlements in an attempt to defeat or diminish the recovery of punitive damages by the class.

The defendants' scheme would thwart the very purpose of a Rule 23(b)(1)(B) class action on punitive damages and circumvent this Court's ruling that claims for punitive damages cannot be settled on an individual basis. To prevent the defendants' attempted end-run around the (b)(1)(B) class action certified by this Court, plaintiffs move for an order *in limine* prohibiting the defendants from using individual settlements to defeat or in any way impair the "single class-wide adjudication . . . of punitive damages" on behalf of all victims of the disaster. (Order, p. 12.)

I. PUNITIVE DAMAGE CLAIMS CANNOT BE SETTLED INDIVIDUALLY.

A. This Court's Order and Memorandum of January 25, 1982, Prohibits Individual Settlements of Punitive Damage Claims.

The short answer to the defendants' Notice is that this Court's Order and Memorandum certifying the class forbids individual settlements of claims for punitive damages. While the Court concluded that individual settlements of claims for compensatory damages are permissible, the Court expressly held that "claimants who want to exact payment for allegedly punishable acts must forego the settlement process and *await the trial of the punitive damage issues.*" (Order, p. 17; emphasis supplied.) As the Court emphasized, settlements of punitive damage claims must be prohibited for one simple and compelling reason:

> Only a single class-wide adjudication of the issues of liability for and amount of punitive damages can protest the interest of every victim in receiving his or her just share of any punitive damage award.

(P. 12.) The issues decided on January 25th including the effect of certification on individual settlements, were thoroughly briefed by all parties over a lengthy period. Plaintiffs explicitly stated that protection of the class's right to a full punitive damage award would require a prohibition of individual punitive damage settlements:

> A settling defendant must not be permitted to argue in the class-wide trial of punitive damages that it has already been punished because a portion of the settlement proceeds were paid in return for the release of the settling plaintiff's claim for punitive damages.

Plaintiffs' Second Supplemental Memorandum in Support of Motion for Class Certification, December 18, 1981, at 26-27. Of the numerous briefs filed by the defendants, not one took issue with plaintiffs' statement that the objective of a (b)(1)(B) class action would be thwarted if individual settlements could be used to reduce or eliminate the recovery of punitive damages by the class. After full briefing and argument of the issues, the Court handed down its rulings. The case should now proceed on the basis of those rulings.

Although the defendants have never moved for reconsideration of the Order and Memorandum certifying the class, they have now given notice that they plan to ignore the Court's ruling that claims for punitive damages cannot be settled individually but must be determined *solely* on a class-wide basis. The defendants plan to negotiate individual settlements "of all claims, including . . . any claim for punitive damages." Notice at 1. The defendants' settlement plans are not only contrary to this Court's Order and Memorandum of January 25, 1982; they are also contrary to the very purpose of a Rule 23(b)(1)(B) class action on puntiive damages and contrary to Missouri's rule prohibiting the use of insurance coverage to pay punitive damages.

B. The Defendants' Plan Flies in the Face of the Whole Purpose of a Rule 23(b)(1)(B) Class Action on Punitive Damages.

It is important to understand just what the defendants now propose to do. The defendants have made it clear that they plan to make essentially the following offer to individual victims:

> We will give you a sum of money if—and only if—you agree to release both your claim for compen-

> satory damages and your claim for punitive damages. If you won't agree to release your punitive claim, we won't even consider a settlement. Take it or leave it.

This, the defendants hope, will be an offer that some victims cannot refuse.

Then, at the class-wide trial on punitive damages, the defendants plan to introduce such settlements and argue to the jury, in substance:

> We've already been punished. We've settled the following punitive damage claims: [reciting the specifics of the cases settled.] We've already been punished. We shouldn't receive still more punishment.

The defendants' scheme would frustrate the whole purpose of certifying a (b)(1)(B) class action on punitive damages. The very reason for trying punitive damages in a (b)(1)(B) class action is to avoid successive awards of punitive damages that would allow the defendants to cry, in each case after the first, "We've already been punished." As this Court has recognized, successive awards of punitive damages would "permit the sacrifice of one aggrieved party's claim for the sole benefit of another aggrieved party." (Order, p. 11.) Victims not first in line would inevitably be prejudiced, because their punitive recoveries would either be reduced or even at some point perhaps eliminated altogether. Given the inequity that would result from a series of punitive damage determinations, "[o]nly a single class-wide adjudication of . . . punitive damages can protect the interest of every victim in receiving his or her just share of any punitive damage award." (Order, p. 12.)

The *"Dalkon Shield"* decision rested on precisely the same rationale:

> Without a Rule 23(b)(1)(B) class action, . . . [t]here is no basis for priority to punitive damages among the claimants, or for awarding such damages to one or more and not to others. . . . [T]he class action is the best available device to protect the interests of all parties.

In re "Dalkon Shield" Litigation, C80-2213 SW (Nov. 5, 1981), at 16.[1]

It would be completely inconsistent with the purpose of a (b)(1)(B) class action to allow the defendants to obtain individual settlements of punitive damage claims and then use such settlements to defeat or diminish the recovery by the rest of the class. The interest of nonsettling members of the class in obtaining punitive damages would be prejudiced *for no reason other than their decision to try their punitive damage claims rather than negotiate quick settlements.* Such an outcome would be grossly unfair. A victim's decision to settle his claim affords no basis whatsoever for impairing the interest of others in obtaining punitive damages. It was precisely in order to avoid such unfairness to victims who are not first in line that a (b)(1)(B) class action was certified. Having certified that class action, this Court should not permit it to be gutted by the defendants' settlement strategy.

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1. *See also Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839 and n.11 (2d Cir. 1967) ("[w]e have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions . . . can be . . . administered," but "[i]f there were any way in which all cases could be assembled before a single court, . . . it might be possible for a jury to make one award to be held for appropriate distribution among all successful plaintiffs"); 4 *Restatement of Torts* 2d § 908, Comment e (1977) ("In a class action involving all claims, full assessment of the punitive damages can be made.").

C. Missouri Law Forbids the Payment of Punitive Damages by Insurers.

The public policy of Missouri forbids the use of insurance proceeds to pay punitive damages. The settlement sought by the defendants would violate that fundamental public policy. For that reason alone, the defendants' scheme is impermissible and improper.

The controlling case is *Crull v. Gleb*, 382 S.W.2d 17 (Mo. App. 1964). The court held that public policy requires that "the burden of paying punitive damages should rest ultimately, as well as nominally, on *the party who actually committed the wrong.*" *Id.* at 23 (emphasis supplied). If a wrongdoer could shift the burden of a punitive damage award to his insurer, "the award would have served no purpose. Plaintiff would have already been made whole through his compensatory damages, and the insurance company, which had done no wrong, would be punished." *Id.*

As stated in *Crull*, "[t]he chief purpose of punitive damages is punishment to the offender. . . ." *Id. See also, e.g., State ex rel. Joseph Belt R. Co. v. Shain*, 108 S.W.2d 351, 356 (Mo. 1937). Allowing insurance against punitive damages would defeat this purpose. "In order for the theory of punitive damages . . . to work, the [wrongdoer] must not be able to transfer his responsibility for punitive damages to others." *Crull v. Gleb*, 382 S.W.2d at 23. Just as insurance against criminal fines is contrary to public policy, public policy "invalidate[s] any insurance contract against [the] civil punishment that punitive damages represent." *Id.* The defendants have made it clear that it is their insurers, not they, who are bearing the cost of settlements. This Court should not allow the defendants to avoid or diminish their responsibility for punitive damages through insurance payments.

II. EVEN IF INDIVIDUAL PUNITIVE DAMAGE SETTLEMENTS WERE PERMISSIBLE, THEY COULD NOT BE USED TO DEFEAT OR DIMINISH THE RECOVERY OF PUNITIVE DAMAGES BY THE CLASS.

Even assuming for the sake of argument that the defendants could properly negotiate individual settlements covering claims for punitive damages, it would be absolutely improper for the defendants to use such settlements to defeat or diminish the recovery of punitive damages by the class. No court has ever allowed a defendant to introduce a prior punitive damage *settlement* in a trial on punitive damages.

Some courts have not even allowed prior punitive damage *verdicts* to be introduced into evidence. *See, e.g., Ostpowitz v. Wm. S. Merrell Co.*, (S. Ct., Westchester Cty., N.Y., Jan. 4, 1967), *cited in Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 834 n.3 and 839 n.9 (2d Cir. 1967). It appears that the Missouri courts may adopt this view. *See Monsanto Co. v. Parker*, No. CV3-80-144CC (C. Ct. Montgomery Cty., Jan. 6, 1981), at 2 (concluding that there is "nothing in Missouri statutory or case law" to indicate that a plaintiff's right to seek punitive damages can be "restricted by the fact that others have, or may in the future, present a similar claim arising out of the same wrongful act of a defendant"), *appeal pending*, No. 43829 (Mo. Ct. App., E.D.).[2]

The furthest that any court has gone is to permit juries to consider prior and potential future punitive damage

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2. It is unlikely that the court of appeals will rule on the merits of this issue in the *Monsanto* case, since there is no basis at all for Monsanto's contention that Missouri law allows only one award of punitive damages for a single act. Since this contention is completely without support in the law of either Missouri or any other state, the court of appeals will likely affirm the trial court's decision that an interpleader action, which presupposes a unitary liability, is unavailable to Monsanto.

verdicts. See State ex. rel. Young v. Crookham, 618 P.2d 1268, 1272-73 (Or. 1980); *Wangen v. Ford Motor Co.*, 294 N.W.2d 437, 459-60 (Wis. 1980). This is the approach suggested by the *Restatement of Torts 2d* where multiple claims arising from a single wrong are tried in individual actions rather than in a class action. 4 *Restatement of Torts 2d* § 908, Comment e (1977).

No court has ever allowed a defendant to introduce a *settlement* of a punitive damage claim. Even the courts that have gone the farthest to protect defendants have limited the jury's consideration to other *verdicts*. *See, e.g., State ex rel. Young v. Crookham*, 618 P.2d at 1273 (allowing consideration of " 'punitive damages that have been awarded in prior suits and those that may be awarded in the future' ") (*quoting Restatement of Torts 2d*, § 908, Comment e); *Wangen v. Ford Motor Co.*, 294 N.W. 2d at 460 ("punitive damages . . . already imposed on the defendant or likely to be imposed"). *See also* Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. 1257, 1319 (1976) ("punitive damages awarded to other plaintiffs").

In short, the most that defendants have received is some protection from *multiple* punishment, protection in the form of jury consideration of other verdicts. The courts have uniformly rejected the notion that a defendant can be punished only once for a single wrong. There is "no principle whereby the first punitive award exhausts all claims for punitive damages and would thus preclude future judgments. . . ." *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d at 839 (footnote omitted). *Accord, State ex rel. Young v. Crookham*, 618 P.2d at 1271-72; *Wangen v. Ford Motor Co.*, 294 N.W. 2d at 459-60.

In this case, however, the defendants have received additional protection far beyond the protection afforded by

the law of punitive damages—they have been assured that they will be punished *only once* for any wrongdoing. The (b)(1)(B) class action on punitive damages removes any possibility of multiple punishment.

And yet the defendants still are not satisfied. They are not satisfied with being assured of only a single day of reckoning. They want that day to be only a partial reckoning. They want to say to the jury, "Don't punish us for the deaths of more than 100 people. We've settled 50 of those cases." They want to say to the jury, "Don't regard this as a case of 200-odd serious injuries. We've settled with 100 of those victims."

The defendants should not be allowed to escape full responsibility for their wrongdoing. The certification of a (b)(1)(B) class action ensures that they will not be punished more than once for their misconduct. But neither should they escape without one, full, complete, and total evaluation of their conduct and the appropriate punishment for that conduct. "In a class action involving all claims, *full assessment* of the punitive damages can be made." *Restatement of Torts 2d* § 908, Comment e (emphasis supplied). The defendants should not be permitted to prevent the Kansas City community, as represented by the jury, from expressing its full moral condemnation of their conduct by returning an award of punitive damages calculated to punish them for *all*—not just some—of the terrible consequences of the collapse of the skywalks on July 17, 1981.

The defendants' proposed use of individual settlements is also precluded by Rule 408 of the Federal Rules of Evidence, which forbids proof of settlements and settlement offers. Rule 408 excludes evidence of "a completed compromise of a claim arising out of the same transaction between a third person and a party to the suit being litigated." 2 *Weinstein's Evidence* ¶408[04] at 408-23 (1981) (footnote omitted). A plaintiff cannot use a settlement

between the defendant and the third party to support his own claim,[3] and neither can a defendant use such a settlement in support of his defense.[4] "Rule 408 codifies the general practices of the federal courts in making compromise agreements inadmissible in such circumstances as proof of liability for, or invalidity of, the claim or its amount." 2 *Weinstein's Evidence* at 408-23 to 408-24 (footnotes omitted).

III. IF EVIDENCE OF THE STATEMENTS IS TO BE ADMITTED, THE JURY SHOULD BE INSTRUCTED THAT NO PORTION OF THE SETTLEMENT PAYMENTS IS ALLOCABLE TO PUNITIVE DAMAGES.

If evidence of the settlements is to be admitted, the jury should be instructed that, as a matter of law, all of the settlement proceeds are allocable to the settling victims' claims for compensatory damages and none are allocable to their claims for punitive damages. Under the Missouri rule prohibiting insurance for punitive damages, none of the settlements entered into by the defendants' insurers can include payment of punitive damages. Although the jury need not be informed of the reason that none of the settlements can cover punitive damages, it clearly should be told that they cannot. Otherwise, the jury would be erroneously led to believe, from the language of the settlements, that the defendants truly have made payments to the settling victims for the release of their punitive damage claims.

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3. *See, e.g., Matter of Sun Oil Co. v. Govostes*, 474 F.2d 1048, 1049 (2d Cir. 1973) (*per curiam*); *Jackson v. Shell Oil Co.*, 401 F.2d 639, 643 (6th Cir. 1968); *Bratt v. Western Air Lines, Inc.*, 169 F.2d 214, 217 (10th Cir.), *cert. denied*, 335 U.S. 886 (1948).

4. *See, e.g., Insurance Co. v. Weides*, 81 U.S. 375, 381 (1871); *Playboy Enterprises, Inc. v. Chuckleberry Publishing, Inc.*, 486 F. Supp. 414, 423 & n. 10 (S.D.N.Y. 1980); *Meek v. Miller*, 1 F.R.D. 162, 163 (M.D. Pa. 19040).

IV. AT THE VERY LEAST, PLAINTIFFS MUST BE PERMITTED TO GO BEHIND THE BARE LANGUAGE OF THE SETTLEMENTS AND SHOW THAT NOTHING WAS PAID FOR THE RELEASE OF PUNITIVE CLAIMS.

If evidence of settlements is to be received, plaintiffs request that, at the very least, they be permitted to go behind the releases and present evidence showing that the settlements do not in fact include any payments for the settling victims' claims for punitive damages. This evidence would include proof of any clauses in the defendants' insurance policies excluding coverage of punitive damages.[5] Similarly, plaintiffs should be able to bring to the jury's attention the Missouri rule against payment of punitive damages by insurers. In short, plaintiffs should be permitted to put the whole picture before the jurors, so that they are not misled by the boilerplate recitals in the settlements themselves.

V. INDIVIDUAL SETTLEMENTS OF COMPENSATORY CLAIMS WILL BE IRRELEVANT IN THE CLASS-WIDE TRIAL ON PUNITIVE DAMAGES.

It almost goes without saying that individual settlements of compensatory claims will be irrelevant in the classwide trial on punitive damages. The issue at that time will be how much the defendants should be *punished* for

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5. Rule 411 of the Federal Rules of Evidence would present no obstacle to such proof. While Rule 411 provides that evidence of insurance or the lack of insurance "is not admissible upon the issue whether [the defendant] acted negligently or otherwise wrongfully," it expressly permits introduction of such evidence "when offered for another purpose . . . ." Here clauses excluding coverage of punitive damages would be offered to rebut the defendants' contention that individual settlements somehow constitute prior punishment for the defendants' conduct. Once the defendants have opened the door by introducing the settlements, they can scarcely be heard to object to rebuttal evidence showing what the settlements actually represent.

their wrongdoing, not how much they should be required to pay in *compensation*. Since the issue will be punishment and not compensation, individual settlements of compensatory claims will be completely irrelevant.[6]

VI. THE DEFENDANTS CANNOT HOLD THIS COURT'S DESIRE TO ALLOW SETTLEMENTS HOSTAGE.

The defendants have indicated that if settlements cannot be obtained on their terms—including a release of both compensatory and punitive claims—they will not settle at all. *See* Notice at 1 ("defendants . . . . will *only* settle . . . . in return for a full release of all claims") (emphasis supplied). This threat constitutes an improper attempt to take advantage of this Court's justifiable desire to permit victims to settle their compensatory claims if they choose to do so. The defendants are presenting this Court with a false set of alternatives: allow settlements on our terms, or there will be no settlements at all.

There is absolutely no reason to believe settlements will stop if this Court simply reaffirms its ruling that they must be limited to compensatory damages. Common sense indicates that settlements will continue if the defendants are willing to negotiate in good faith. As is true in any mass disaster, some victims will be willing to accept settlements of their compensatory claims for far less than they might be able to obtain at trial, so that they can

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6. The defendants may plan to argue that their willingness to enter into individual settlements shows that their conduct has not really been malicious, reckless, or wanton. But the defendants' conduct *after* the disaster has no bearing whatsoever on whether their conduct *prior* to the disaster was malicious, reckless, or wanton. Only the conduct that caused the disaster is relevant to the award of punitive damages. If the settlements have any relevance at all, the proper occasion for considering them would be on a motion for remittitur. Even then, plaintiffs would take the position that the settlements have no bearing on whether the jury's award is excessive.

eliminate any uncertainty and receive their money now. For such victims, the defendants would be foolish not to attempt to reach a settlement. For example, any defendant would settle a paraplegic's compensatory damage claim to avoid the very real prospect of a jury award many times greater than the amount of the settlement. It would be completely illogical for a defendant to bypass such a settlement simply because the paraplegic's claim for punitive damages would remain intact. Whatever the defendants are now saying, this Court can be fully confident that they will recognize when settlements are in their economic interest and that they will act accordingly.

Refusal to accede to the defendants' ultimatum thus should not prevent legitimate settlements. Only the defendants' selfish desire to punish the plaintiffs and this Court for the class certification can stop settlements. Moreover, as this Court recognized at the December 10th certification hearing when confronted with plaintiff-intervenors' claim that class certification would put an end to the settlement process, the one thing that will do more to facilitate settlements than anything else is a speedy trial of the class-wide issues. Once those issues are resolved, settlements can be expected to follow in rapid succession. *See* Transcript of December 10, 1981, Hearing at 74 (after class-wide trial is completed, victims "could go ahead and settle all they wanted to"). The efforts of all concerned should be directed to ensuring an expeditious trial, not to revising the ground rules for settlements and undercutting the purpose of a (b)(1)(B) class action on punitive damages.[7]

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7. Another troubling consequence of defendants' scheme is its unfairness (perhaps intended) to counsel for the class. The proceedings between now and mid-August may well put it beyond

(Continued on following page)

CONCLUSION

The type of settlement the defendants plan to obtain would include releases of claims for both compensatory damages and punitive damages. Neither release would be admissible in the class-wide trial on punitive damages.

The release of a victim's punitive damage claim would be inadmissible for two reasons. First, claims for punitive damages simply cannot be settled on an individual basis. Such settlements would be contrary to this Court's Order and Memorandum certifying the class, contrary to the purposes of a (b)(1)(B) class action on punitive damages, and contrary to the Missouri rule prohibiting insurance for punitive damages. Second, even assuming that punitive damage claims could be settled on an individual basis, those settlements would be irrelevant in the class-

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Footnote continued—

doubt that the day of trial will, for one or more defendants, be a day of reckoning indeed. Defendants therefore may raise the level of their offers in order to accelerate the pace of settlement, hoping that by August 16 something close to 100% of the class settles. Assume that defendants succeed and that as of August 16, every claim has been settled save that of Shirley Stover, the class representative. If defendants have their way, the verdict in Mrs. Stover's trial for punitive damages will be adversely affected by the settlements with all other class members. The jury's verdict after the evidence of settlement is presented, will be, let us say, $1 million, and the verdict the jury would have rendered had there been no settlements, $500 million. Many of the settlements, in fact, most, if not all, of those occurring shortly prior to trial, will have been made possible by the skill and energy of counsel for the class in prosecuting an action that induced the defendants to agree to settlements. Yet, these efforts will have also brought about a diminution of the fund secured for the non-settling class members. How then is counsel's compensation to be determined? And who is to pay it? The settling class members or those who go to trial? Or both? And in what proportion? If the recoveries generated, in whole or part, by class counsel, are deemed to be anything more than the jury verdict, what is the source of the money to pay whatever the Court allows counsel for the class? We do not now have answers. We merely identify the questions to emphasize the imprudence of defendants' proposal.

wide trial on punitive damages. There is no authority whatsoever for introducing prior settlements in the very first trial on punitive damages. A settlement in no way constitutes a determination of the appropriate punishment for a defendant's wrongdoing. Furthermore, proof of settlements is barred by Rule 408 of the Federal Rules of Evidence.

The release of a victim's claim for compensatory damages would be inadmissible for the simple reason that it is irrelevant to the determination of how much the defendants should pay in punitive damages.

For the foregoing reasons, this Court should enter an order *in limine* barring the defendants from using individual settlements to defeat or diminish the recovery of punitive damages by the class.

Respectfully submitted,

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February 10, 1982

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Plaintiffs' Motion In Limine with Memorandum in Support thereof were mailed, postage prepaid, this 10th day of February, 1982, to:

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